United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-1302

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P/S

To be argued by
MYLES C. CUNNINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1302

UNITED STATES OF AMERICA,
Appellee,

—against—

JACK GALLO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

MYLES C. CUNNINGHAM,
Assistant United States Attorney,
Of Counsel.

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Preliminary Statement

This is an appeal from a judgment of conviction entered August 1, 1975 in the United States District Court for the Eastern District of New York (Judd, J.) convicting the appellant, Jack Gallo, of 7 counts of a 9 count indictment charging 9 distinct offenses of possession of airline tickets stolen from interstate shipments (Title 18, United States Code, § 659). After a jury trial appellant was sentenced to imprisonment for a period of one year to run concurrent on Counts 4, 5 and 6 and 5 years on the remaining Counts 1, 2, 7 and 8 with imposition of the 5 year sentence suspended. A $2,500 fine was also imposed Appellant is free on bail pending appeal.

Statement of Facts

During the late winter and early spring of 1973 approximately 7,000 blank airline tickets disappeared from six distinct and separate interstate shipments (T. 400-401).[1] The Federal Bureau of Investigation commenced an investigation and recovered approximately 1,500 to 2,000 of these tickets,[2] unfortunately after the tickets had been utilized (T. 402). The investigation consisted, in part, of the FBI attempting to locate and interview the passengers who had utilized the bogus tickets and to ascertain from them their source for the tickets (T. 402-403). In addition, all tickets that were recovered were sent to the Federal Bureau of Investigation Forensic Laboratory in Washington, D.C. for handwriting analysis.

During the course of the trial witnesses Flaum (T. 205-206), Hoffman (T. 217-220), Galina (T. 227-229) and Curzio (T. 237-239) testified that they purchased the illicit tickets, not knowing they were stolen, from one Lawrence Truscio, proprietor of the Tom Jones Hair Salon.

Mr. Truscio testified at trial and implicated the appellant as his source of the airline tickets which he then, in turn, sold to the aforementioned purchasers and others (T. 249-257). He further testified that he would either pick up the tickets at appellant's place of business, Mark V, Ltd. or that the appellant would deliver the tickets to his beauty salon (T. 271).

Cheryl Speerin Pellegrino and Joan Serrano, acquaintances of the appellant, similarly testified that on different occasions they accompanied the appellant on airline flights to Jamaica (T. 381-382) and Puerto Rico (T. 367-369),

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[1] "T." refers to pages in the trial transcript.

[2] Approximately 5,000 tickets are still unaccounted for.

respectively, and on each occasion the appellant furnished the airline tickets, which were later determined to have been stolen.

Robert Kanne testified that he was the Director of Circulation for the Rubin H. Donnelly Corporation, publisher of the Official Airlines Guide. This publication sets forth the fares and schedules for all airlines, both North American and European. Mr. Kanne stated that a search of the company's records revealed that Mark V, Ltd. was a subscriber to the Guide from May, 1973 through April, 1974 (T. 330-331). Mark V, Ltd. was a clothing store in Brooklyn, owned and operated by the appellant (T. ....).

Maurice Fitzgerald, Director of Fraud Prevention for Pan American World Airlines, testified that the tickets were worth the face amount inscribed upon the ticket (T. ....). Mr. Fitzgerald further testified that it is unlawful to sell airline tickets for less than the face amount of the ticket and also that appellant had no authority to possess, write upon or sell any airline ticket (T. 303).

Agent Michael Rigolizzo testified that appellant appeared at the office of the United States Attorney on three separate occasions and gave handprinting exemplars, in his presence, without the compulsion of a court order (T. 405-406). He stated that on each occasion appellant was requested to fill in certain forms, which resembled blank airline tickets, with certain information read to him by Agent Rigolizzo (T. 405-408). Numerous questions were put to Agent Rigolizzo by the defense, regarding the manner in which the appellant conducted his handprinting task and the agent testified that he noted nothing unusual and that it did not appear that the defendant was attempting to disguise his handwriting (T. 406-418). Agent Rigolizzo further testified that the necessity for the three

separate handprinting appearances by the appellant was occasioned at the request of the defense counsel (T. 415-416). The samples of handprinting, once obtained from appellant, were then forwarded to the FBI Laboratory, in Washington, for comparison wtih the handprinting on the stolen airline tickets. It was ultimately ascertained that 427 of the tickets submitted for comparison had been printed in a manner matching appellant's exemplars (T. 404).

Special Agent William S. Oberg of the Federal Bureau of Investigation testified that he is a document examiner in the FBI Laboratory in Washington and after having been qualified as an expert stated that in the course of his official duties he made comparisons of the known handprinting of the appellant with the handprinting on all the recovered airline tickets stolen from the interstate shipments. As a result of this comparison, Agent Oberg stated that the handprinting found on the airline tickets identified in Counts 1, 2, 4, 5, 6, and 7 of the indictment was executed by the same printer as on the appellant's exemplars (T. 445-449).

The jury, after a brief deliberation, found appellant guilty on Counts 1, 2, 4, 5, 6, 7 and 8. Appellant was acquitted on Counts 3 and 9.

ARGUMENT

POINT I

Neither the Court's charge to the jury on the issue of knowledge nor its comments on the testimony of witnesses deprived appellant of a fair trial.

Appellant contends in Point I that Judge Judd erred in instructing the jury on the element of knowledge and further assigns error in Point III of the comments of the Court on the testimony of witnesses. These allegations are not supported by either the law or the record of the case. Moreover, it should be noted that appellant made no objection to the Court's instruction on the element of knowledge (T. 635).

(1)

Federal Rule of Criminal Procedure 30 states, in applicable part:

> [N]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

This Court has held in *United States* v. *Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973) that such a failure to object below "is sufficient reason to reject a (his) claim of error" (citing *ABA Standards Relating to Trial by Jury*). Similarly, *United States* v. *Rothman*, 463 F.2d 488 (2d Cir.), *cert. denied*, 409 U.S. 956, *rehearing denied*, 409 U.S. 1050 (1972) dealt specifically with the waiver of rights occasioned by the failure of defense counsel to object when the court omitted a cautionary instruction which would have been required to

have been given, if requested. The Court in *Rothman*, *supra*, at 490, held:

> [T]he failure to request such an instruction when Gray and Mitchell testified or when the trial judge discussed his proposed charge, and the failure to take exception to the charge as delivered, constitutes a waiver of that right.

The reason for that rule was set forth in *United States* v. *Atkinson*, 297 U.S. 157, 159 (1935) as "founded upon consideration of fairness to the court and to the parties and of the public interest in bringing litigation to an end . . ."

It is, of course, recognized, however, that this Court has the inherent power to notice plain error on appeal even when it was not brought to the attention of the trial court. F. R. Cr. P. 52 (b). The exercise of this power is discretionary, even as to errors which invoke a defendant's constitutional rights, *United States* v. *Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965), *cert. denied*, — U.S. — 383 U.S. 907 (1966). The assignment of error and prejudice set forth by appellant does not reach the criteria as set forth in *United States* v. *Atkinson*, 297 U.S. 157, 160 (1935) as it would not

> "seriously affect the fairness, integrity or public reputation of judicial proceedings"

and should be regarded as harmless if considered at all.

Concededly, there was no "balancing" in the Court's charge on the element of knowledge (T. 618) as that form is used in *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975), however the theory of the case at bar differed vastly from that in *Bright* where the defendant admitted possession but claimed that her possession was innocent. Unlike *Bright*, the instant case presented no serious

knowledge issue. Once appellant's possession of the tickets was established, the conclusion that he knew they were stolen was unavoidable. Appellant's handprinting was identified on 427 tickets which had been stolen from interstate shipments. Overwhelming evidence was presented that the appellant had possessed, given away or sold at a discount [1] twenty-seven of the tickets described in the indictment, plus countless others not ascertainable. In addition, it was shown that he was not authorized to possess any blank airline tickets nor did he attempt to explain away the possession.

Appellant offered no requests to charge to the Court, presented no witnesses, and relied on the strategy of discrediting the testimony of the government witnesses and its handwriting expert. Accordingly, where the appellant does not attempt to assert an innocent connotation to his possession and, in fact, specifically denies any possession through his plea of not guilty there is no balancing to be performed. The Court did not deliver a "conscious avoidance" charge in the genre of *United States* v. *Olivares-Vega*, 495 F.2d 827 (2d Cir. 1974) or *United States* v. *Joly*, 493 F.2d 672 (2d Cir. 1974) as it merely instructed the jury that a simple finding of possession of the airline tickets was insufficient and had to be joined with a finding that the appellant, in fact, knew the airline tickets to be stolen.

Considering the strong evidence of appellant's possession, the claim that the "balancing" language of *Bright* and *United States* v. *Jacobs*, 475 F.2d 270 (2d Cir. 1973), *cert. denied sub. nom.*, *Lavelle* v. *United States*, 414 U.S. 821 should have been included in Judge Judd's instruction is difficult to understand since the language itself would

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[1] Sale of airline tickets at a discount is prohibited under 49 U.S.C. 1472(d).

implicitly suggest to the jury that the Court had concluded that the possession was indeed shown. Apparently defense counsel realized this and did not object to the instruction. For the Court to have attempted to balance this charge, as suggested by the appellant, would have surely "conveyed the notion that the evidence had already revealed Gallo's possession" (App. Br. 25).

It is respectfully submitted that the charge on the element of knowledge was proper and only thought of as prejudicial after the verdict.

Appellant, in addition to alleging error in the charge of the court, assigns error to two gratuitous comments made by Judge Judd on the evidence during the course of his charge. While the Government was diligent to point out the failure of appellant to object to the charge of the court on the issue of knowledge it must similarly acknowledge that the comments of the court on the evidence were objected to in a timely manner (T. 635).

During the summation of appellant's counsel, an attempt was made to instill in the jury a belief that the defendant's voluntary submission to the furnishing of handwriting exemplars and the failure to attempt to disguise his writing was indicative of innocence. The court charged the jury as follows:

> Another rule of law which applies in this case is that a defendant may be required to give handwriting exemplars. The Supreme Court of the United States has said that there is no violation of the privilege of self-incrimination requiring someone to give samples of their handwriting. It is a type of identification, like having them stand in line-ups to show whether he is or isn't the one who

> committed the crime. That doesn't mean that Mr. Gallo's involuntary submission is not a factor to consider whether he was conscious of guilt, but it does indicate that if he had not voluntarily submitted he may have been compelled to provide the exemplars, and you could consider that in bearing on it.

Appellee fails to comprehend the objectionable portion of this instruction as it has been conceded by counsel that it is a clearly correct statement of the law. (App. Br. 33) and one that reinforces appellant's position that the voluntariness of his submission is a factor to be considered.

Appellant next takes exception to the comments of Judge Judd on the credibility of the Government's expert witness and apparently claims that the following portion of the charge exceeded the bounds of proper comment:

> We have a special rule with respect to expert witnesses. Generally a witness can testify only to facts and not to his opinion, but where there are matters that require special skill, an expert who has skill in the field may testify, and Mr. Oberg was proffered as a man who has experience in analyzing handwriting and hand printing, and you may give such credence to his testimony as you see fit. You don't have to believe an expert. He may be an expert but you are the fact-finders and you can examine the basis for his expression of opinion and the facts that underly and determine who much credence to give it, much the same way as you do with any fact witness. I would say that I don't think there is any grounds to criticize him because he didn't reach a conclusion on the first set of specimens. You may consider that as affecting his reliability. You may consider it as being an element of caution, with a man's liberty at stake. He

> wanted to have as precise comparisons as he could before expressing an opinion, or you may say that he just wanted to have enough so he could nail this guy. As I say, a Government witness is judged by the same standards of credibility, agents are judged by the same standard of credibility as other witnesses. The defendant's counsel said it was an insult to your intelligence to present the second report after the first one. I think you should regard that as highly verbal exaggeration by counsel. I did not consider it an insult to my intelligence. I considered the finding. The evidence that Mr. Oberg was not able to reach a definite conclusion on the marked exemplars, the credibility of the expert leaving it for you to decide on the basis of the facts.

While we firmly believe that no error at all was committed by Judge Judd, we add, out of a sense of caution, that any error must be considered in the light of both the entire charge and the evidence adduced at trial. As stated in *United States* v. *Bernbaum*, 373 F.2d 250, 257-258 (2d Cir.), *rehearing denied*, 375 F.2d 232, *cert. denied*, 389 U.S. 837 (1967):

> In evaluating the instructions to the jury, not only must each statement made by the judge be examined in light of the entire charge, but the charge itself can only be viewed as part of the total trial. Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial. Moreover, a juror's perception of the judge's attitude concerning the case, assuming he has displayed one, will be influenced not only by what the judge says in his charge, but also by how the judge conducted himself from the outset of the trial.

Judge Judd did tell the jury that while a federal judge may comment on the evidence, it is the jury that is the sole judge of the facts (T. 630-631). Judge Judd repeatedly emphasized to the jury that the expert's reliability and credibility was to be determined by them. Furthermore, Judge Judd, after commenting on the evidence, advised the jury that his discussion of the evidence should not in any way be construed as having expressed any opinion as to the guilt or innocence of any defendant (T. 631). When viewed in the context of the entire proceeding, including the overwhelming evidence against Gallo, any error in the charge must be viewed as harmless.

POINT II

The evidence of appellant's similar acts was properly admitted.

The Court, over the objection of defense counsel, permitted the Government to introduce evidence that appellant's handprinting was found on over 400 stolen airline tickets in addition to the airline tickets described in the indictment. Appellant alleges that error was committed by the failure of Judge Judd to make a specific determination that he had

> "... balance[d] all of the relative factors to determine whether the probative value of the evidence outweighe[d] its prejudicial character." *United States* v. *Brettholz*, 485 F.2d 483 (2nd Cir. 1973)

before permitting the introduction of the evidence of similar acts. Appellant further alleges that even had the Court made such a determination the evidence would not have been admissible due to its prejudicial impact. (App. Br. p. 26)

Prior to the introduction of the evidence linking the appellant to the additional 400 stolen airline tickets an offer of proof was made by the Government. Defense counsel argued strenuously against the admission of such testimony and presented all of the factors necessary for the Court to "balance all of the relative factors" and make a determination. (Tr. 387-398) The Court, while listening to the argument, acknowledged its familiarity with *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967) (T. 388) and advised counsel as follows:

> The Court: I see the substance of your argument and the fact that it may be something that is telling evidence against the defendant, but I think under the Deaton Rule, I am going to accept it. (Tr. 398)

In light of the above colloquy, appellant's claim that the Court never applied the balancing test is without merit.

Appellant's second argument, that the admission of the testimony was *prima facie* reversible error is equally without foundation. The law in this Circuit, as set forth in *Deaton* and *Brettholz* is that evidence of similar acts "is admissible when it is substantially relevant for a purpose other than merely to show defendants criminal character or disposition." *Deaton, supra* at 117. Clearly the admission of the similar acts was relevant evidence as it tended to show appellant's knowledge of the illicit nature of the tickets,[1] *United States* v. *Freedman*, 445 F.2d 1220, 1224 (2nd Cir. 1971) and the Court admitted the testimony for just such purpose:

> The Court: I think, having in mind that the knowledge of theft is a state of mind which has to

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[1] Maurice Fitzgerald of Pan American Airways testified that appellant was not authorized to "have anything to do with Pan Am tickets" (Tr. 65-66).

come from circumstantial evidence to a large extent, the Government should be permitted to do it (T. 391).

Any prejudice resulting from the introduction of such evidence, when balanced against its probative value, is minimal and its admission was proper.[2]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

October 23, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

MYLES C. CUNNINGHAM,
Assistant United States Attorney,
Of Counsel.

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[2] Although the trial of the instant case occurred before the effective date of the newly adopted Federal Rules of Evidence, it is noteworthy that Rule 404 is a legislative codification and endorsement of the "inclusory" form of the rule traditionally followed in this Circuit.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 24th day of October 1975 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Gustave H. Newman, Esq.
522 Fifth Avenue
New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

Sworn to before me this

24th day of October 1975

IRENE B. COHEN (DE MACQUAY)
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Commission expires March 30, 1977